BRIEF ON MERITS

No. 621.

IN THE

# Supreme Court of the United States

October Term, 1955.

MARTHA C. REED,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

# BRIEF FOR THE RESPONDENT.

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## QUESTION PRESENTED.

Is a file clerk entitled to maintain an action for personal injuries under the provisions of the Federal Employers' Liability Act when it appears that her only duty on behalf of her employer, an interstate railroad, was to carry tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building?

## STATEMENT OF THE CASE.

This was an action for personal injuries brought under the Federal Employers' Liability Act. The pleadings consisted of a complaint and an answer, which admitted that respondent was an interstate carrier and that petitioner was its employee, but denied that petitioner was engaged in interstate commerce. After filing its answer, respondent took petitioner's deposition and answered interrogatories propounded by petitioner.

Chief Judge Kirkpatrick (United States District Court, Eastern District of Pennsylvania) granted respondent's motion to dismiss on the ground that petitioner's deposition and respondent's answers to interrogatories established that petitioner was not furthering interstate commerce or directly or closely and substantially affecting such commerce and that, therefore, her claim was not within the provisions of the Federal Employers' Liability Act. Since there was no diversity between the parties there was no other basis of federal jurisdiction. From the order of dismissal, petitioner appealed to the United States Court of Appeals for the Third Circuit which, in a well-reasoned opinion by Judge Goodrich, affirmed the decision of the District Court. Chief Judge Biggs dissented.

In her deposition, petitioner stated that the accident occurred during her lunch hour on July 19, 1951, when a wind and hail storm blew in a window and she was cut on the right arm (30a-35a).

She testified that for eight or nine years her job classification had been "print maker", her duties had been what she would call those of "a file clerk" and her work consisted exclusively of "filing" transparent prints in the office of the Mechanical Engineer on the fifth floor of respondent's 32nd Street Building in Philadelphia (22a, 23a, 24a). In elaborating upon the details of her job she described it as follows: she was handed an order to remove certain num-

bered papers from a filing cabinet; she removed the needed tracings from the file and gave them to a man in the blueprint department; when he completed his use of those papers, he returned them to her and she replaced them in the file cabinet; these were her only duties (23a, 27a, 28a, 29a, 30a, 54a).

The work of the department of the Mechanical Engineer included the preparation of blueprints from tracings of equipment used on all parts of respondent's railroad. The tracings were kept on file in that department and the blueprints made from the tracings were sent to all states through which the railroad operated its interstate system (19a, 20a, 23a, 27a, 29a). However, petitioner had nothing whatever to do with the preparation of the prints or with their distribution to other parts of the railroad system (54a).

## SUMMARY OF ARGUMENT.

Petitioner was not the type of employee who came within the definition of that term as it is used in the Federal Employers' Liability Act. Since the sole basis of federal jurisdiction in this case was the fact that it was brought under that Act, its obvious inapplicability left the District Court with no course other than to dismiss the proceeding.

The first Employers' Liability Act, enacted in 1906, was drafted in language broad enough to cover all employees of all employers engaged in the transportation industry. It was declared unconstitutional because it embraced a regulation of an employer-employee relationship which was beyond the realm of congressional power under the Constitution.

The second Employers' Liability Act of 1908 was framed to meet the constitutional limitations which had been laid down in the *Employers Liability Cases*. As interpreted by this Court, the second Act applied to railroad employees who were engaged in interstate *transportation* or in work so closely related thereto as to be practically a part of it. However, recovery was permitted under the Act only if the employee was engaged in interstate transportation at the very *moment of injury*.

By 1939 virtually all the states had adopted legislation compensating employees injured in intrastate commerce. Between the remedy provided by the federal statute and that afforded under state law, there had thus grown up a dual system for the adjudication of the rights of railroad employees who were injured or killed in the course of their employment. Between 1908 and 1939 the question of whether an employee was covered by the state or federal legislation was not based on the general character of his duties but rather on the nature of his work at the instant of his injury. If, at that moment, the employee was engaged in interstate transportation or work so closely

related thereto as to be practically a part thereof, he was entitled to the benefits of the federal legislation. If, at that instant, his activities were not connected with interstate transportation, his remedy was under the laws of the states. The remedies were mutually exclusive and many border-line cases arose involving employees who were uncertain as to the nature of the work they were engaged in at the "moment of injury". Where the injured employee chose the wrong forum, he often found that his claim in the other one had been barred by the statute of limitations.

To remedy the hardship presented by the so-called "border-line cases", the 1939 Amendment to the Employers' Liability Act provided that any employee, any part of whose duties was in furtherance of interstate commerce or any part of whose duties directly or closely and substantially affected such commerce, was entitled to the remedies of the Act. This change in language was intended only to abolish the "moment of injury" rule. Its purpose was not to bring all railroad employees within the scope of the federal legislation to the exclusion of remedies provided by the states but rather to provide for the inclusion within the Act of all employees who were engaged in interstate transportation even though some of their duties might be intrastate in nature.

The proof of the fact that the 1939 Amendment was intended to enlarge the scope of the Act only to a limited extent rather than to embrace all railroad employees and supplant the state remedies can be clearly demonstrated:

1. The 1908 Act had been consistently interpreted as applying only to those employees who faced the hazards that were peculiar to the railroad industry, and the historical development of the legislation made it clear that Congress in 1939 had no intention of changing the basic concept of the Act.

2. The legislative history of the Amendment shows that Congress was concerned with the elimination of the

"moment of injury" rule and not with a general broadening of the Act which would bring all employees within its coverage.

3. The Amendment involved a re-enactment of the original Section 1 of the 1908 Act and that carried with it the gloss of this Court's construction that the Act was solely concerned with employees connected with transportation.

4. The wording of the new paragraph added to Section 1 by the 1939 Amendment shows clearly that the elimination of the "moment of injury" rule was the sole matter with which Congress was concerned.

5. A comparison of the Amendment with the language of earlier and contemporary legislation involving the commerce power shows that Congress would have used broader language had it intended to bring all railroad employees within the Act.

6. The interpretation of the Amendment by this Court and the lower Federal and State courts for a period of seventeen years indicates that the Act was not intended to make the FELA the exclusive remedy for all injured railroad employees and only the same general classes of employees who were within the coverage of the Act prior to the Amendment have been permitted to recover since its passage.

## ARGUMENT.

### Introduction.

Petitioner's right to recovery depended on proof that she was the type of employee embraced within the coverage of the Federal Employers' Liability Act. In the absence of diversity of citizenship there was no other basis for federal jurisdiction. Thus the validity of the action of the Court below in dismissing this proceeding depends entirely on whether petitioner is within the scope of the Act.

The applicability of the statute to a particular employee is governed by Section 1. That section is composed of two paragraphs, the first having been enacted in 1908[1] and re-enacted in 1939, and the second being added by the 1939 Amendment.[2] Eliminating non-essentials, the section reads as follows:

> "Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . employees of such carrier, or by reason of any defect . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.
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> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

1. Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. § 51.
2. Act of August 11, 1939, c. 685, 53 Stat. 1404, 45 U. S. C. § 51.

The petitioner claims that the 1939 Amendment brings within the scope of its provisions virtually all employees of a railroad engaged in interstate commerce and Chief Judge Biggs, in his dissenting opinion, apparently accepted that view. It is the contention of the respondent, and the majority of the Third Circuit so ruled, that the Amendment had no such effect and that its meaning could not be stretched to include an employee whose duties were as remote from interstate commerce as were those of petitioner.

Thus, the issue involves solely a matter of statutory construction, and, in the light of the interpretation which has been consistently given to the Act by this Court over a period of forty-eight years, there can be no real ambiguity with regard to its coverage as set forth in its first section. An understanding of the section as a whole can only be attained by examining, first, the meaning of the original paragraph as established by this Court in many decisions between the adoption of the Act in 1908 and its Amendment in 1939, and, secondly, by seeking the intention of Congress as expressed in the second paragraph, which was added by the Amendment.

## A. The Scope of the Employers' Liability Act Prior to the 1939 Amendment.

The first Employers' Liability Act of 1906[3] had been declared unconstitutional shortly before the passage of the second Act. Congress was determined that the 1908 Act should escape the fate of the Act of 1906 and hence the framework of the later Act was blocked out with this Court's opinion in *The Employers' Liability Cases*, 207 U. S. 463 (1908) very much in the congressional mind. The scope of the earlier Act and the reason for its invalidation had been summarized in the following sentence from that opinion (page 498):

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3. Act of June 11, 1906, c. 3073, 34 Stat. 232.

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

In the light of that opinion, Congress narrowed the scope of the coverage of the Act of 1908 and in Section 1 expressly limited recovery to injuries suffered by the employee "while he is employed by such carrier in such commerce".

In interpreting the 1908 Act, this Court established two basic principles which, up to 1939, furnished the determining factors in all decisions involving the coverage of the Act. In the first place, the Court declared that the word "commerce" as used in the Act meant "transportation" and hence the section should read as though it limited recovery to injuries suffered by an employee "while he is employed by such carrier in interstate transportation".[4] In addition, the Court said that the Act required a finding that the employee was engaged in interstate transportation at the "moment of injury". Thus, in its approach to each case the Court did not look at the general nature of the duties of the employee who was injured but concerned itself only with the character of the *transportation* in which the employee was engaged *at the moment of injury*. If the transportation or instrumentality of transportation was interstate at that instant, he was covered by the federal statute; if it was not, his remedy was under state law.[5]

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4. The word "commerce" in the first line of the Act should also be read as though it were "transportation". Thus, the Act applied only to "every common carrier by railroad while engaging in interstate transportation".

5. *New York Central R. R. v. Winfield*, 244 U. S. 147 (1917).

Three cases set the basic pattern.

*Pedersen v. D. L. & W.*, 229 U. S. 146 (1913) prescribed that the work of the injured employee must have close proximity to the interstate commerce upon which the recovery would depend. There a carpenter, whose duty it was to repair a bridge which carried interstate traffic, was injured while carrying some bolts and rivets to the bridge. Recovery was based on the fact that the bridge was an "instrumentality of interstate commerce" and the work was "so closely connected therewith as to be a part of it" (page 151).

In *Illinois Central v. Behrens*, 233 U. S. 473 (1914), the "moment of injury" test was formulated. The deceased, a member of a switching crew, handled interstate and intrastate trains indiscriminately. He was killed while moving an intrastate train and recovery under the federal law was denied for that reason.

*Shanks v. D. L. & W.*, 239 U. S. 556 (1916) involved a car repairman who, when he was hurt, was moving a countershaft used to carry power to machinery. In denying coverage under the federal act, the Court made clear that recovery depended on employment in interstate *transportation*, saying at page 558:

> "the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

That test was applied again and again[6] and, after fifteen years, in *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74 (1931), the Court said at page 79:

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6. In two cases, *Erie R. R. v. Collins*, 253 U. S. 77 (1920), and *Erie R. R. v. Szary*, 253 U. S. 86 (1920), this Court departed from the rule of the *Shanks* case. In *Chicago & E. I. R. R. v. Com.*, 284 U. S. 296 (1932), those cases were expressly overruled for that reason.

"'Since the decision in the *Shanks* case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated."

In the thirty-one years during which cases involving injuries to railroad employees were brought to this Court, prior to the 1939 Amendment, three clearly defined classes of employees were found to be within the scope of the Act. It is important that those classes be carefully noted because when, in the last section of this brief, an examination is made of the types of employees who have been permitted to recover since the adoption of the Amendment, it will be seen that precisely the same classes have been granted recovery after 1939 as prior thereto. Those employees may be classified[7] as follows:

(a) those engaged in train movements (the train crews),[8]

(b) those whose duties were directly connected with that movement (switchmen, signalmen, crossing watchmen and yard employees),[9] and

(c) those whose work was closely related to keeping the instrumentalities of interstate transportation in a proper state of repair (maintenance workers and repairmen).[10]

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7. For a substantially similar classification of the employees within the Act prior to the 1939 Amendment, see Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), page 1370.

8. *North Carolina R. R. v. Zachary*, 232 U. S. 248 (1913) (fireman); *New York Central R. R. v. Carr*, 238 U. S. 260 (1915) (brakeman); *Erie R. R. v. Welsh*, 242 U. S. 303 (1916) (conductor).

9. *Norfolk & Western R. R. v. Earnest*, 229 U. S. 114 (1913) (switchman); *Pecos v. Northern Texas R. R.*, 240 U. S. 439 (1916) (yard clerk); *Southern Pacific R. R. v. Industrial Accident Commission*, 251 U. S. 259 (1920) (electric lineman).

10. *Walsh v. N. Y., N. H. & H. R. R.*, 223 U. S. 1 (1912) (car repairman); *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146 (1913) (bridge repairman); *Southern Ry. v. Puckett*, 244 U. S. 571 (1917) (track clearer).

The opinions of this Court reflect a frank recognition of the fact that the purpose of the Act was to provide a special remedy for those railroad employees who faced the special hazards of railroading.[11] The decisions confined recovery to those who were actually engaged in transportation or those who, generally speaking, were in close physical and practical proximity to the instrumentalities of transportation, the "cars, engines, machinery, track, roadbed, works, boats, wharves or other equipment", which were specifically mentioned in Section 1 of the Act. Where there was physical proximity to interstate transportation or its instrumentalities, the Court found the necessary close relationship to transportation which made the work of the employee "in practice and in legal contemplation a part of it".[12] And conversely, those whose duties did not bring

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11. The philosophy underlying the Act was that which had inspired earlier railroad legislation in England, continental countries and some of the states. See Reports of House Judiciary Committee, dated March 15, 1906, Report No. 2335 (1906 Act), and April 4, 1908, Report No. 1386 (1908 Act). In report No. 2335 it was said at page 2:

> "In 1888 England passed an act which abolished the doctrine of fellow-servant with reference *to the operation of railroad trains*, and in 1897 it extended this law to apply to many of the *hazardous employments of the country.*" (Emphasis supplied.)

In reporting on the 1906 Act, Representative Sterling said, 40 Congressional Record 4602:

> "I think it would apply to trainmen, switchmen, men in the roundhouse that have charge of the engines, and any other employees whose duty relates to or is connected with the business of carrying commerce, but I do not believe it would go any further than that."

The House report on the 1908 Act was substantially similar to that accompanying the 1906 Act. A review of the entire legislative history of both Acts (and the 1939 Amendment as well) reveals that many examples were given as to the type of employee for whose benefit the legislation was intended. Not one employee is referred to outside the field of those exposed to the hazards peculiar to train transportation.

12. *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. R.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago M. & St. P. Ry.*, 250 U. S. 130, 133 (1919); *So.*

them into physical proximity to such transportation or its instrumentalities were said to be without the scope of the Federal Act and within the coverage of the state laws. Clerical workers, for example, whose duties confined them to the sanctuary of the upper floors of an office building, faced no hazards peculiar to the railroad industry since their duties did not bring them into proximity with any of the instrumentalities of transportation. This Court twice stated that such employees were outside the coverage of the Act.[13] It will be seen that there was no provision in the 1939 Amendment which would change this basic conception of the scope and purpose of the Act and that the decisions after 1939 have been wholly consistent with the earlier view.[14]

To summarize: Congress, when it enacted the Act of 1908, had no intention of including all employees within its provisions. The remedies of the Act were made available only to those who were engaged in interstate commerce. And under the decisions of this Court they had to be engaged in interstate *transportation* at the very *moment of injury.* The Court afforded the remedy to employees who were engaged in train movements and those who performed closely related work and faced the hazards of "railroading". In order to recover, however, these employees had to establish not only that they were normally engaged in interstate transportation but that they were so engaged at the moment when they received their injuries.

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*Pacific R. R. v. Commission*, 251 U. S. 259, 263 (1910); *Chicago & N. W. Ry. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 420 (1932).

13. *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922); *N. Y., N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 419 (1932).

14. In cases since the 1939 Amendment the purpose of the Act as it affects those engaged in "railroading" has frequently been recognized. See for example *Bailey v. Central Vermont R. R.*, 319 U. S. 350, 354 (1943) and the comments of Mr. Justice Frankfurter in his dissenting opinion in *Stone v. N. Y. C. & St. L. R. R.*, 344 U. S. 407, 410 (1953).

## B. The Interpretation of the 1939 Amendment.

### 1. The Problems It Was Intended to Solve.

The language of the Amendment is best understood when it is read in the light of the evils it was intended to remedy and the jurisdictional situation as it existed in 1939. There were two major defenses which employees continually encountered in suits brought under the 1908 Act, namely the "moment of injury" rule and the doctrine of assumption of risk. The latter did not present a difficult problem for it was easy to abolish the defense *in toto*. However, the question of coverage, which had been presented in as many as 43 cases coming before this Court between 1908 and 1933,[15] was much more difficult to solve.

It should be remembered that the 1908 Act permitted recovery to employees who were engaged in interstate transportation but only if they were so engaged at the time of their injuries. By the time Congress undertook to amend the Act in 1939, all but two of the states had enacted workmen's compensation laws or state employers' liability acts,[16] and those railroad employees who sustained injuries while engaged in intrastate activities found redress under state legislation. Remedies were therefore available for all railroad employees but difficulties arose when an employee, at the instant of his injury, was engaged in some activity not clearly definable as interstate or intrastate.

The problem faced by Congress in 1939 was not merely a jurisdictional conflict between federal and state power. It likewise involved a question of the desirability of two different types of remedy. State compensation was available irrespective of fault; the Federal Act required proof

15. See Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard L. Rev. 389, 397-398 (1934), reviewing the cases.

16. Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940*, at pages 27-28 (1947).

of negligence.[17] Notwithstanding the fact that the measure of recovery under the Federal Act was likely to be greater, in numerous cases both before and after 1939 the borderline employees sought recovery under state acts.[18] Undoubtedly many of these claimants were motivated by their desire to secure speedy and sure relief and their uncertainty about negligence. Congress was not unaware of the social undesirability of requiring all railroad employees to prove negligence in order to recover and to face the uncertainty, delay and expense of a jury trial.[19]

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17. *Wilkerson v. McCarthy*, 336 U. S. 53, 61; 65, 68 (1949).

18. Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940*, pages 107, 119, 124, 134 (1947).

19. A report was made in 1947 by the Railroad Retirement Board to the Senate Committee on Interstate and Foreign Commerce pursuant to Senate Resolution 128, 77th Congress (1941) on the incidence of work injuries in the railroad industry, their cost, and social and economic consequences. This report dealt with injuries incurred in 12 selected months of 1938-1940 (page 6). It strongly bears out the wisdom of Congress in its determination in 1939 not to bring clerical and other local employees within the provisions of the Act. The Board found that in the 1938-1940 period of the study only two out of the 49 state jurisdictions (including the District of Columbia) had no form of compensation system in operation (page 27) and 71% of the cases not brought under federal legislation were workmen's compensation cases (page 29); that the frequency rate of injury to trainmen was 28.6 (injuries per million man hours worked) compared to 2.4 in the case of supervisory, clerical and other non-manual employees, while the severity rate (days lost per thousand man hours worked) was 8.6 for the trainmen as compared to 0.5 for the clerical (page 11); that the majority of clerical employee injuries consisted of temporary total disabilities of 4 or more days (Appendix C; Table C-3) for which an employee was compensated more adequately under workmen's compensation (page 135); and that the great delays in securing payments made the FELA compare unfavorably with the compensation system (page 14). The over-all tenor of the report, which impliedly favored the establishment of a federal compensation act (page 187 et seq.), is that the non-operating personnel fare much better under the state laws than under the FELA. The Board reaffirmed (page 145) the earlier conclusion of the study made by the Federal Coordinator of Transportation:

> "The railroad-accident compensation system takes on many aspects of a lottery from which a few employees draw large sums but from which many receive insufficient awards."

Three possible solutions were available: (1) enactment of a federal compensation act for all railroad employees, (2) extension of coverage of the FELA to all railroad employees or (3) elimination of the "moment of injury" test and extension of coverage to border-line employees.

From 1912 to 1935 Congress had constantly had before it the possible enactment of a federal compensation act covering all railroad employees. In 1912 such an act was passed by both the Senate and the House but the minor discrepancies between the two bills were never reconciled.[20] In the 1930's similar legislation covering all railroad employees and patterned after the Longshoremen's & Harbor Workers' Compensation Act [21] was also considered.[22] Notwithstanding considerable support, this legislative cure was never successfully accomplished.[23]

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20. See S. 5382, 62d Cong., 2d Sess., 48 Cong. Rec. 5923-5959 (1912), 49 Cong. Rec. 4476-4547 (1913), 49 Cong. Rec. 4562-4563, 4676-4677 (1913).

21. Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901.

22. See S. 4927, 72d Cong., 1st Sess., 75 Cong. Rec. 13760 (1932); S. 5695, 72d Cong., 2d Sess., 76 Cong. Rec. 5069 (1933); S. 1320, 73d Cong., 1st Sess., 77 Cong. Rec. 1624 (1933); S. 3630, 73d Cong., 2d Sess., 78 Cong. Rec. 8982 (1934); S. 3152, 74th Cong., 1st Sess., 79 Cong. Rec. 10029 (1935).

23. See, Rubinow, *Accident Compensation for Federal Employees*, 2 American Labor Legislation Review 29 (1912); Andrews, *Interstate Compensation for Transportation Workers*, 25 American Labor Legislation Review 169 (1935); Richberg, *Advantages of a Federal Compensation Act for Railway Employees*, 21 American Labor Legislation Review 401 (1931); Wagner, *Federal Workmen's Compensation for Transportation Workers*, 26 American Labor Legislation Review 15 (1936); *The Railroad Industry and Work-Incurred Disabilities*, 36 Cornell L. Q. 203 (1951); Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard L. Rev. 389 (1934); Albertsworth and Cilella, *A Proposed "New Deal" for Interstate Railway Harms*, 28 Illinois L. Rev. 587 and 774 (1934); *Symposium on the Federal Employers' Liability Act*, 18 Law and Contemporary Problems 107 (1953); Miller, *Workmen's Compensation for Railroad Employees*, 2 Loyola L. Rev. 138 (1944); Gelhorn, *Federal Workmen's Compensation for Transportation Workers*, 43 Yale L. J. 906 (1934); Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940* (1947).

There is no evidence that Congress at any time intended to impose the FELA on non-transportation railroad workers. That would have required them to establish negligence in order to recover lost wages and medical expenses, a necessity which has caused the FELA to be characterized as "archaic".[24] No possible justification has been suggested for a different treatment for railroad clerical workers than that provided by the states for office workers in any other form of business. They should share the protection of legislation enacted for the benefit of all in the community.

It is clear that Congress in the 1939 Amendment intended only to eliminate the confusion resulting from the border line cases and adopted the third solution set forth above: the repeal of the "moment of injury" rule and its replacement by a test involving the general nature of the employees' duties. It will be seen that the effect of this test was to bring all transportation workers within the federal remedy and leave all other employees where they were before.

Finally, there is no evidence of any kind, within the language of the Amendment or in its legislative history, that Congress intended to break down the dual system of federal and state remedies which had been created by 1939 for the benefit of all injured railroad employees. It sought only to protect the rights of the "border-line" employees whose duties carried them back and forth between inter-

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24. ". . . archaic and unjust as a means of compensation," Justice Frankfurter concurring in *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 71 (1943); ". . . crude, archaic and expensive as compared with the more modern systems of workmen's compensation," Justice Douglas in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354 (1943).

"This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws." Justice Frankfurter concurring in *Wilkerson v. McCarthy*, 336 U. S. 53, 65 (1949).

state and intrastate transportation and who frequently had difficulty in establishing or ascertaining the nature of that transportation at the time of the accident.[25]

2. The Legislative History.

Its legislative history established beyond the possibility of contravention that the Amendment of Section 1 had no purpose other than the abolition of the "moment of injury" rule.

At the outset, it should be observed that a study of the entire legislative history of the Act of 1906, the Act of 1908 and the 1939 Amendment, reveals that many illustrations were given of employees intended to be encompassed by the federal legislation. There is not a single reference at any stage of any one of the three pieces of legislation to an employee who was not exposed to the hazards peculiar to the railroad industry. The legislative history of the 1939 Amendment, particularly, makes it clear that Congress intended to deal only with employees who were engaged in "railroading", i.e. transportation activities.

25. The following are examples of the types of cases presenting the evil which Congress intended to cure:

*Ill. Central R. R. v. Behrens*, 233 U. S. 473 (1914) (Crewman on switch engine handled "interstate and intrastate traffic indiscriminately"; handling only intrastate when injured); *Shanks v. Delaware, Lack. & West. R. R.*, 239 U. S. 556 (1916) (Locomotive repairman who, on the day of injury, was engaged in installing a heavy shop fixture); *Illinois Central R. R. v. Peery*, 242 U. S. 292 (1916) (Northbound run usually carried interstate freight, but, southbound, on which injury occurred, carried intrastate freight only); *Erie R. R. v. Welsh*, 242 U. S. 303 (1916) (Yard conductor injured while going to pick up order to make up interstate train); *Industrial Accident Commission v. Davis*, 259 U. S. 182 (1922) (Repairman not engaged in interstate commerce because the interstate engine on which he was working when injured had been removed therefrom 68 days); *New York, New Haven & Hartford R. R. v. Bezue*, 284 U. S. 415 (1932) (Plaintiff injured while working on a dead engine out of interstate commerce 12 days for heavy repairs); and *Chicago & Northwestern R. R. v. Bolle*, 284 U. S. 74 (1931) (Usually fired interstate engines but plaintiff, at time of injury, was firing an engine used to heat station facilities).

At the hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 28-29, 1939, T. J. McGrath,[26] General Counsel for the Brotherhood of Railroad Trainmen, who was the principal witness to advocate the adoption of the Amendment, made clear that it was not intended to go beyond the transportation employees already covered by the Act. He said, at pages 4 and 8:

> "The amendment of 1908 was intended to and did restrict the application of the act to employees of common carriers by railroad who were injured while the employees themselves were engaged in interstate commerce. The Court, in interpreting that section, clarified it to that extent, and perhaps it might be said they limited its application by *defining interstate commerce as being transportation in interstate commerce, so that the law really applies to train and enginemen while engaged in moving interstate commerce over the road and to other employees whose work is incidental to that sort of thing, men working in roundhouses, loading cars in interstate commerce, and so forth.*
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> . . . . .
>
> "Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . .*" (Emphasis supplied.)

Senate Report No. 661, 76th Congress, First Session, June 22, 1939 (pp. 2-3) illustrates quite clearly that the

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26. Despite Mr. McGrath's modest statement of the study which he had given to the 1939 Amendment (Brief for Petitioner, p. 8) he referred by name to most of the cases which we have listed in the immediately preceding footnote.

broadened scope of coverage was intended to eliminate only the "moment of injury" test in both its troublesome aspects; i.e., what was the injured employee doing and for what purpose was the equipment on which he was working being used at the instant of his injury:

> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce; or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.
>
> * * *
>
> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce.
>
> * * *
>
> "*The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic*" (emphasis supplied).

Furthermore, prior to the passage of the Senate bill, changes were made in its text which had the effect of narrowing the coverage of the Act and preventing it from being interpreted in the manner advocated by the petitioner in this case.

Thus the first version of the Senate bill provided coverage for:

> "Any employee of a carrier any portion of whose duties as such employee shall be the furtherance of or

> in any way affecting interstate or foreign commerce as above set forth, or whose duties as such employee shall be in any degree incidental thereto."[27]

Thereafter, the Senate substituted the more restricted language, "in any way directly or closely and substantially".

This Court has, on a number of occasions, given weight to deliberate changes that have been made during the course of the legislative process.[28] We submit that petitioner's argument is aimed at persuading the Court to interpret the Act as though it embodied the provisions of the bill in its early stages rather than those of the final enactment.

The legislative discussion of the 1939 Amendment in the House concerned itself with the problem of assumption of risk and no reference is made in its report to the question of coverage. The employees with whom the House was concerned were those who were engaged in transportation or in work close to the instrumentalities of transportation, and assumption of risk, of course, presented no problem in so far as clerical workers were concerned. In the Report of the House of Representatives, Committee on Judiciary, 76th Congress, First Session, Report No. 1222 on H. R. 4988, referring to the assumption of risk provision, it is said (p. 5):

> "Manifestly, all that is sought to be done is to prevent the master from embarking upon a practice of negligence *with respect to the physical conditions upon and along the right-of-way.*" (Emphasis supplied.)

Since the House made no suggestion at all to alter the coverage of the Act, it is vain to attribute to it an intention to revolutionize the coverage.

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27. Hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 29, 1939, p. 2.

28. See *Western U. T. Co. v. Lenroot*, 323 U. S. 490, 509 (1945); *Penna. R. R. v. International Coal Co.*, 230 U. S. 184, 198 (1913); *Carey v. Donohue*, 240 U. S. 430, 436, 437 (1915).

After the two houses of Congress had disagreed as to the exact terms of the Amendment, a committee of conference met and recommended its adoption in the form in which it now stands. In relation to the coverage of the Act, their *entire* report is as follows (84 Congressional Record 11107):

> "The conferees agreed to a Senate provision, not contained in the House amendment, which is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers *who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (Shanks v. D., L. & W. R. R.)." (Emphasis supplied.)

Thus the Amendment, as well as the original Act, was entirely directed toward providing a remedy for workers in interstate transportation, and the only change insofar as coverage was concerned was to continue the protection of the federal remedy to such workers when they were "temporarily divorced therefrom and engaged in intrastate operations". Under no stretch of the imagination could Mrs. Reed be described as an employee "ordinarily engaged in the transportation of interstate commerce" who was, "at the time of injury, temporarily divorced therefrom and engaged in intrastate operations".

3. The First Paragraph of the Amended Section 1.

The petitioner would have the Court decide this case by a mere application of a phrase or two which may be selected from the second paragraph of Section 1. The context, the thirty-one years of the Act's history, and the actual congressional intent are ignored. Above all, petitioner has overlooked the fact that Section 1 of the Act has two paragraphs, that the first stands exactly as it did in the Act of 1908, that it was given a "warp and woof" by many decisions of this Court prior to 1939, and that Congress, in reenacting that paragraph when it amended the Act, must be deemed to have intended to preserve the "gloss of its construction" by this Court. Furthermore, since the two paragraphs are closely tied together, the second cannot be construed in such a way as to disregard the existence and meaning of the first. (Petitioner did not so much as cite the first paragraph in setting forth "The Stat[u]te Involved", Brief for the Petitioner, page 3.)

Again and again, Congress has reenacted portions of a statute which had been the subject of judicial interpretation and this Court, in construing the later enactment, has found that it carried with it the construction which had been given to the earlier legislation. The addition of new provisions modifies those which are retained and the gloss of their construction only to the extent that Congress has exhibited an intention to accomplish such a change. *U. S. v. Ryan*, 284 U. S. 167, 175 (1931); *Missouri v. Ross*, 299 U. S. 72, 75 (1936); *Francis v. Southern Pacific Co.*, 333 U. S. 445, 450 (1948); and see Appendix B to the dissenting opinion of Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632, 690 (1949).

In the 1939 Amendment, Congress has expressed its purpose in terms that admit of no doubt. The reenactment of the original paragraph confirms what is learned from the historical development of the Act and its legislative history. It shows conclusively that Congress was still concerned

about railroad employees who were engaged in interstate transportation and that the sole purpose of the Amendment, in so far as Section 1 was concerned, was to remove the "moment of injury" rule from the Act. The retention of the first paragraph was a clear indication that the word "commerce" was still to be taken as meaning "transportation" and the adherence to *interstate* transportation indicated Congress' continuing preoccupation with the plight of those employees who, traditionally, had been embraced within the field of federal regulation. The reenactment of that paragraph also demonstrated the absence of any intention to bring within the coverage of the Act the great mass of railroad employees who were engaged in intrastate or local activities.

4. The Second Paragraph of the Amended Section 1.

An examination of the key clauses and phrases of the paragraph added by the 1939 Amendment demonstrates that their obvious meaning supports the construction contended for by respondent. The words in question are "commerce", "any part of whose duties", the "furtherance" clause, the "directly" clause and the "closely and substantially" clause.

*"Interstate or foreign commerce . . . such commerce as above set forth".*

As heretofore pointed out, this court had interpreted the word "commerce" as used in the Employers' Liability Act to mean "transportation". In using the same term in the amendatory paragraph without giving it a new definition, Congress must be presumed to have intended it to have the same meaning that this Court had so consistently given it prior to 1939. Thus, no basic change in the scope of applicability was intended; the remedy was to continue as one designed for employees engaged in interstate transportation. The avowed purpose of eliminating the "moment of

injury" rule bears out this construction, for the employees whose claims had been barred because of the application of that rule were all employees normally engaged in transportation. The same was true of those who had been barred by assumption of risk. No one would seriously contend that the abolition of these two defenses was designed for the benefit of non-operating, white-collar employees.

### *"Any part of whose duties."*

It should be noted that the two clauses which are said by petitioner to "open up" the Act to all railroad employees (i.e. the "furtherance" clause and the "directly or closely and substantially" clause) have for their subject the phrase "any part of whose duties". It is apparent from a reading of the Amendment that that phrase is its very crux. By its terms, the test of inclusion within the Act was transformed from the old one of duties at the time of the accident to a test of duties in general. On the one hand, therefore, his phrase indicates the clear purpose of Congress to eliminate the "moment of injury" rule.[29] In addi-

29. It should be remembered that the rule eliminated two groups of employees: those who were generally engaged in interstate commerce but were in intrastate at the time of the accident, and those who performed work on equipment which was normally used in interstate commerce but which had been withdrawn from such commerce at the time of the injury. *Illinois Central R. R. v. Behrens*, 233 U. S. 473 (1914), in which a member of a switching crew happened to be moving intrastate cars when he was killed, illustrates the first group; *Minneapolis & St. L. R. R. v. Winters*, 242 U. S. 353 (1917), in which plaintiff was injured while repairing a locomotive used in interstate commerce both before and after the accident, is an example of the second. Obviously, the scope of the coverage of the Act was very materially widened when these employees were brought within the Act.

The double aspect of the problem of the "moment of injury" rule was described in *Baird v. N. Y. C. R. R.*, 229 N. Y. 213, 86 N. E. 2d 567 (1949), at page 569, as follows:

> "But the new 1939 language cannot, of course, be read off by itself. We know, from the decisions above cited and many others, that the amendment was enacted in the light of two

tion, it precludes a rational argument that all employees were intended to be brought within the Act by these clauses. Provision for the inclusion within the Act of an employee "any part of whose duties" affects commerce in a specific way, necessarily implies recognition of the fact that there are other employees no part of whose duties may have such effect. Petitioner in this case is just such a person.

*The "furtherance" clause.*

The amendatory paragraph covers in effect three different groups of employees. The "furtherance" clause, which covers the first group, reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce . . . shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce . . . ."

The meaning of the words "furtherance of commerce" is perfectly clear if for "commerce" one substitutes "transportation", the word which this Court had established that it meant when it appeared in this Act. "Furtherance" when applied to transportation was intended to mean "movement" in the physical sense, and by this clause Congress sought to keep within the scope of the Act all transportation employees (i.e. the crews of trains) regardless of their activities at the moment of the accident.[30] If "fur-

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limiting rules of the cases: one, the so-called 'pin-point rule' forbidding recovery unless the work was interstate transportation or very closely connected therewith at the very time of the accident, and, second, the so-called 'back shop' rule which said that 'dead engines' in the course of repair were not instrumentalities of interstate transportation."

30. The words "furtherance" and "furthering" were used in that general sense prior to the adoption of the Amendment. Thus in Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), it was said:

> "a fireman on duty on a train carrying freight from one state into another is engaged in interstate commerce because he is

therance" is given a meaning broad enough to embrace every employee of a railroad carrier, the remainder of the paragraph is redundant and without sensible meaning. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932); *McDonald v. Thompson*, 305 U. S. 263, 266 (1938); *Singer v. U. S.*, 323 U. S. 338, 344 (1945).

*The "directly" clause.*

This covers a second group of employees who are brought within the coverage of the Act. The clause reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee . . . shall, in any way directly . . . affect such commerce as above set forth shall for the purposes of this chapter, be considered as being employed by such carrier, in such commerce . . ."

As pointed out above, at page 11 *supra*, the decisions of this Court prior to the Amendment did not confine recovery to those who were actively moving trains in interstate transportation. It also included those whose duties were "connected with that movement, not indirectly or remotely, but

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actually furthering the movement of interstate traffic." (page 1372)

"For like reasons trainmen on such trains are furthering interstate transportation and hence subject to the Federal Employers' Liability Act while picking up, at stations en route, cars to be included in the train and carried forward, regardless of whether such cars are themselves interstate or local in character." (page 1418)

"The rule to be deduced from the foregoing cases would seem to be that if, in connection with a switching operation, any interstate purpose is intended or accomplished, the movement as a whole is in furtherance of interstate transportation; . . ." (page 1432)

See also *Erie R. R. v. Welsh*, 242 U. S. 303, 306 (1916); *Murray v. Pittsburgh R. R.*, 263 Pa. 398, 401, 107 Atl. 21 (1919); *Hines v. Wicks*, 220 S. W. 581 (Tex. App. 1920).

*directly* and immediately"[31] (emphasis supplied)—these being, in general, the switchmen, signalmen, yard and station personnel. The "directly" clause, therefore, kept within the coverage of the Act the members of that group of employees regardless of their activities at the moment of injury.

*The "closely and substantially" clause.*

Here again, a group of employees is brought within the Act irrespective of their activities at the time of the accident. The clause reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee . . . shall, in any way . . . . closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce . . . ."

It was pointed out, at page 11 *supra*, that in addition to those employees who moved the instrumentalities of interstate transportation (the train crews) and those who were directly connected with the movement (the switchmen and yard personnel), there was a third class of employees (maintenance and repairmen) who, prior to the 1939 Amendment, had been held to be within the scope of the Act on the ground that their "work of keeping . . . instrumentalities of interstate transportation in a proper state of repair . . . (was) so *closely* related to such commerce as to be in practice and in legal contemplation a part of it"[32] (emphasis supplied). Such employees are further

31. *St. Louis, San Francisco Ry. v. Seale*, 229 U. S. 156, 161 (1913); *N. Y. Central R. R. v. Carr*, 238 U. S. 260, 264 (1915); *Erie R. R. v. Welsh*, 242 U. S. 303, 306 (1916).

32. *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. R.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago, M. & St. P. Ry.*, 250 U. S. 130, 133 (1919); *So. Pacific R. R. v. Commission*, 251 U. S. 259, 263 (1920); *Chicago & N. W. Ry. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 420 (1931).

away from transportation than the train crews and the track and yard personnel of the first and second groups but closer to it than those whose duties are purely local or intrastate in character or do not involve any interstate activity whatever. The obvious purpose of the "closely and substantially" clause is the inclusion within the coverage of the Act of those repairmen and maintenance personnel who, in the absence of the Amendment would have been barred from recovery because their injury occurred while they were repairing or servicing a "dead" locomotive or an intrastate train.

To summarize: the language of the second paragraph of the 1939 Amendment to Section 1 of the Act permits only one explanation of the congressional purpose. The "moment of injury" rule was intended to be eliminated with respect to all classes of employees who, under the earlier decisions of this Court interpreting the Act, had been included within its provisions. Thus, the three groups which fell within the earlier rulings were covered in the following manner:

a. within the "furtherance" of transportation clause, those actively engaged in moving the equipment of transportation;

b. within the "directly" clause, the non-operating personnel who were immediately concerned with the movement of transportation; and

c. within the "closely and substantially" clause, the non-operating personnel who kept the instrumentalities of transportation—trains, tracks and roadbeds—maintained and in repair.

Transportation is the center of three concentric circles surrounding, respectively, each of the three groups. The second clause and its circle (yardmen) are farther from transportation than the first circle (the crews of the trains). The third circle (maintenance and repairmen) is still further removed from transportation than is the second. Outside the final circle—the dividing line between those who are

and those who are not included within the coverage of the Act—lie those no part of whose duties substantially and closely affect interstate transportation.

If, as petitioner contends, virtually all railroad employees were brought within the Act by the "furtherance" clause, the section as a whole would be redundant. All that precedes it and all that follows it would be unexplainable. In effect, the first paragraph limiting coverage to transportation workers would be repealed although reenacted. The words which follow, "directly or closely and substantially affecting commerce", would add nothing since there would be no employees not already covered. Why should Congress indulge in such meaningless circumlocution if in fact its purpose was to make the Act apply to all employees of an interstate carrier? That result, if intended, would easily have been accomplished by merely eliminating the phrase "in such commerce" from the following clause in the first paragraph:

> "shall be liable in damages to any person suffering injury while he is employed by such carrier *in such commerce*" (Emphasis supplied.)

and the whole second paragraph would have been entirely unnecessary.

### 5. The Language of the Amendment in the Light of Other Legislation Based on the Commerce Power.

In essence, petitioner contends that the Court must find in the language of the Amendment an intention on the part of Congress to reach out and embrace railroad employees who are not transportation workers including those who are solely engaged in intrastate and local activities. There is no doubt whatever that Congress could have brought such employees within the Act had it so intended. It is equally clear that Congress did not so intend and was not attempting to explore how far it might go to enlarge the coverage of the Act.

A review of earlier railroad legislation shows that at the time of the adoption of the Amendment, Congress was aware of its power to regulate intrastate employees and that when so minded it expressed its intention in language which made clear the all-embracing character of the scope of the particular Act. Furthermore, an examination of the provisions of other federal enactments during the years immediately preceding the adoption of the Amendment reveals the marked difference between the phraseology of the Amendment and the language used by Congress when it actually sought to exercise the full measure of its power under the commerce clause.

*Federal Statutes Regulating Railroads.*

In the earlier statutes which regulated the employer-employee relationship in transportation, Congress had veered between a broad coverage of employees in some and a narrow coverage in others. In each case, however, the language showed whether all or a limited group were to be within the Act. In the Employers' Liability Act of 1906, Congress provided that "every common carrier . . . shall be liable to any of its employés". The 1908 Act cut liability down to "to any person suffering injury while he is employed by such carrier in such (interstate) commerce".[33] The Adamson Law,[34] enacted in 1907, applied only to employees "actually engaged in or connected with the movement of any train". In the field of labor regulation, the Erdman Act [35] of 1898, applied to "any person seeking employment" or "any employee", and was declared unconstitutional in *Adair v. U. S.*, 208 U. S. 161 (1902). Conse-

33. This Court noted, prior to the adoption of the 1939 Amendment, that the Employers' Liability Act did not exhaust the limits of the congressional power under the commerce clause. *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 477 (1914).

34. Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. § 61.

35. Act of June 1, 1898, c. 370, 30 Stat. 424.

quently in the Railway Labor Act of 1926, as amended,[36] the term "employee" was limited to persons performing "work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission". The first Railroad Retirement Act of 1934[37] applied to employees of any carrier on the date of passage of the Act as well as those who later became employees or had been employed one year prior to that date. It, likewise, was declared unconstitutional, *Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935), but the opinion of the Court made it perfectly clear that Congress had the power to regulate all railroad employees.[38] In consequence a new Railroad Retirement Act was adopted in 1937[39] and defined "employee", inter alia, as "any individual in the service of one or more employers for compensation" and "employer" as "any carrier". Equally broad definitions are found in the Railroad Unemployment Insurance Act, adopted in 1938.[40]

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36. Act of May 20, 1926, c. 347, § 1, 44 Stat. 577, as amended, June 7, 1934, c. 426, 48 Stat. 926, June 21, 1934, c. 691, 48 Stat. 1185, June 25, 1936, c. 804, 49 Stat. 1921, 45 U. S. C. § 151.

37. Act of June 27, 1934, 50 Stat. 307.

38. The Court said, at pages 369-370 of the *Alton* opinion:

"In the absence of a rule applicable to all engaged in interstate transportation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. . . . In dealing with the situation it is permissible to substitute a new remedy for the common-law right of action; to deprive the employer of common-law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems."

39. Act of June 24, 1937, 50 Stat. 307, 45 U. S. C. § 228.

40. Act of June 25, 1938, c. 680, 52 Stat. 1094, 42 U. S. C. §§ 503, 1104, 1107, 45 U. S. C. §§ 351-363, 364, 366, 367.

Thus Congress had on occasion made the legislation apply to all employees at one extreme and to train crews only, at the other. In the 1939 Amendment, it was redefining the coverage to include an intermediate group: transportation workers and those closely related to the instrumentalities of transportation. It is inescapable that if Congress had intended the Act to apply to all employees, it would have said so in so many words. Whatever doubts there may have been at some earlier date as to its power to include all employees within the FELA, such doubts had been fully dispelled by 1939. In the light of its experience with the Railroad Retirement Act and this Court's decision in the *Alton* case, it is impossible to explain the language of the 1939 Amendment as an exploratory attempt by Congress to cover such employees as might fall within its constitutional power of regulation.

The legislation which in all other respects is most closely analogous to the FELA is the Jones Act,[41] adopted in 1915. That law applies to "any seaman who shall suffer personal injury in the course of his employment", and if Congress had intended to make the 1939 Amendment equally broad it could have done so in precisely the same way. It retained the phrase "in such commerce", however, and with that provision still there, the FELA cannot be given the same broad coverage as that extended to seamen under the Jones Act.

*Other Contemporary Legislation.*

During the decade of the nineteen thirties, Congress, in asserting its broad powers under the commerce clause, used two legislative devices to make clear its intentions as to the coverage of a particular act. The first was the inclusion of an introductory statement of policy to show

41. Act of March 4, 1915, c. 153, § 20, 38 Stat. 1185, as amended, Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U. S. C. § 688. Held constitutional: *Panama R. Co. v. Johnson*, 264 U. S. 375 (1924).

that it was seeking to regulate matters which might previously have been considered as falling within the realm of state regulation. Illustrations of such policy declarations are found in the Securities Exchange Act of 1934,[42] the Interstate Transportation of Petroleum Products Act of 1935,[43] the Public Utility Holding Company Act of 1935,[44] the Bituminous Coal Act of 1937,[45] the Natural Gas Act of 1938,[46] and the Fair Labor Standards Act of 1938.[47] No one could doubt that Congress intended to extend its power to regulate labor relations so as to include industrial employees within the scope of the National Labor Relations Act.[48] Repeated reference to "industry" in the declaration of policy made that intention clear.

The second device was the adoption of an all-embracing definition for the word, "commerce", or the term, "affecting commerce", and in the Fair Labor Standards Act and the National Labor Relations Act, the use of such broad definitions provided clear guides to the breadth of their intended coverage. The impact of the FLSA on the wages and hours of employees in industry and other activi-

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42. Act of June 6, 1934, c. 404, 48 Stat. 881, 15 U. S. C. 77.

43. Act of Feb. 22, 1935, c. 18, 49 Stat. 30, 15 U. S. C. 715-715k.

44. Act of Aug. 26, 1935, c. 687, Tit. I, 49 Stat. 803, 15 U. S. C. 79 to 79-6.

45. Act of April 26, 1937, c. 127, § 1, 50 Stat. 75, 15 U. S. C. § 828.

46. Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U. S. C. §§ 717-717w.

47. Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. § 201.

48. The Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151 empowered the N. L. R. B. to prevent any person from engaging in any unfair practice "affecting commerce". "Affecting commerce" was defined as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a dispute burdening or obstructing commerce or the free flow of commerce." This Act was held to be constitutional in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

ties formerly considered local arises very largely from the fact that Congress specifically made it apply to employees "engaged in commerce or in the production of goods for commerce" and defined those words in the broadest terms.[49]

The amended FELA, however, has no declaration of policy and no new definition of the terms "commerce" or "affecting commerce" to indicate the intention of Congress to bring all employees within the Act. The terms "directly" and "closely and substantially" were probably derived from the case of *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453 (1938). Therein the Court sustained the authority of the Board over a local fruit packing cannery which was essentially local though 37% of its total "pack" was shipped into interstate or foreign commerce. The Court said at pages 466-467:

> "To express this essential distinction, 'direct' has been contrasted with 'indirect', and what is 'remote' or 'distant' with what is 'close and substantial'. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce', 'due process', 'equal protection'. In maintaining the balance of the constitutional grants and limitation, it is inevitable that we should define their

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49. "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 29 U. S. C. § 203 (b).

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods or in any process or occupation necessary to the production thereof, in any State." 29 U. S. C. § 203 (j).

applications in the gradual process of inclusion and exclusion."

While it is true that the *Santa Cruz* case established that effects upon commerce which were "direct" or "close and substantial" could be regulated by Congress, there is nothing in the opinion which would warrant the inference that those words provided a magic formula which meant that their mere use would bring all employees within the scope of an act. To the contrary the question of coverage was held to rest "in the gradual process of inclusion and exclusion".

In the light of the whole legislative background, the language of the 1939 Amendment is not obscure. The elimination of the "moment of injury" rule was carefully spelled out. It resulted in an inclusion within the Act of certain employees, a part of whose duties carried them into intrastate transportation. Congress, which in 1939 still had fresh in mind the fate of some of the early legislation of the Roosevelt administration, sought to avoid the danger that the whole new provision might be rendered unconstitutional because of the failure to show that there was a relationship between such employees and interstate commerce. It dealt with that possibility not by bringing within the Act all railroad employees and asserting that all of them affected commerce, for that was not its intention. It merely showed that those whom it did intend to cover were within the commerce power since their duties did affect commerce either directly or closely and substantially.

In placing a meaning on the clauses in question, sight should not be lost of the fundamental fact that the Act is dealing only with employees engaged in interstate transportation. The purpose of the language employed was both inclusive and exclusive,[50] and there is no room for

50. As in the case of the FLSA, the scope of the 1939 amendment to the FELA was not extended to the limits of Congressional power. See, for example, Justice Frankfurter in *A. B. Kirschbaum*

inference that the real purpose of Congress was to bring within the coverage of the Act employees whose duties were local and intrastate and had no relationship to transportation.[51] For such employees, this Act was not designed.

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*Co. v. Walling*, 316 U. S. 517, 523 (1942), and Justice Douglas in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570 (1943). The problem in the present case is also, like that in FLSA cases, one of "delineation," not "constitutional power". See *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 89-90 (1942).

51. The words of this Court in *10 East 40th St. Co. v. Callus*, 325 U. S. 578, 582 (1945) (holding that an employee was not encompassed by the FLSA), with the interlineations suggested in parentheses, resolve the issue in the present case:

> ". . . merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods," (a movement by rail in interstate transportation) "does not bring it within the scope of the Fair Labor Standards Act." (Federal Employers' Liability Act) ". . . we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

Compare the test suggested in the "Brief for Petitioner" at pages 20-21:

> "In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of a 'messenger boy' at the end of a 'dire chain of catastrophe' and remarking 'One is reminded of the old rhyme "for want of a nail the shoe was lost"' (at p. 813)."
>
> "It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment."

And at page 23:

> ". . . Without the prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as 'dismal' (at page 813)."

## C. The Federal and State Decisions Since the 1939 Amendment.

Petitioner ignores the long series of decisions by this Court interpreting the 1908 Act, suggests that the legislative history is "completely useless" [52] in resolving the issue presented in the case at bar, and argues that various federal and state decisions since the Amendment support the proposition that employees engaged in intrastate or local activities are encompassed within the broadened scope of the FELA coverage.

The cases which have been decided since 1939 are, however, in harmony with an interpretation which credits the Amendment of Section 1 with no greater impact on the coverage of the Act than the elimination of the "moment of injury" rule. No case (other than the *Southern Pacific* cases now pending before this Court) has been found in which recovery has been permitted if the employee's general duties did not fall within the three classes to which the Act had been applied prior to the Amendment. Several cases have suggested that the language of the Amendment has broadened the Act's coverage beyond the mere elimination of the "moment of injury" rule but the pronouncements to that effect have been purely dicta.

### *The Circuit Court Cases.*

Six Circuit Court decisions have held that the railroad employees involved were covered by the Act as amended in 1939. Not one of them is authority for a holding that the petitioner is covered in the case at bar or is inconsistent with the interpretation which is asserted in this brief.

*Edwards v. Baltimore & Ohio R. R. Co.*, 131 F. 2d 366 (7th Cir. 1942) involved a machinist's helper who was repairing a stoker in a locomotive which was temporarily out of interstate service. The worker in *Shelton v. Thomson*, 148 F. 2d 1 (7th Cir. 1945) was employed in the railroad's

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52. Brief for Petitioner, p. 7.

storehouse operating a crane which hoisted car wheels and other equipment into position during a stage in the repair of freight cars. In *Southern Pacific Co. v. Libbey*, 199 F. 2d 341 (9th Cir. 1952) the plaintiff, a student fireman, was injured when he jumped from a locomotive cab because of a flashback fire. Plaintiff in *Robinson v. Pennsylvania R. R. Co.*, 214 F. 2d 798 (3rd Cir. 1954) was a carpenter engaged in the repair of a bridge under which interstate rail traffic moved. In *Peresiptka v. Elgin, J. & E. Ry. Co.*, 217 F. 2d 182 (7th Cir. 1954) the plaintiff was engaged in assisting the work of car repairmen.[53]

Petitioner contends that *Straub v. Reading Co.*, 220 F. 2d 177 (3rd Cir. 1955) strongly supports recovery in the case at bar. The plaintiff was an assistant timekeeper who supervised the railroad's timekeeping system and saw that the men who operated the trains were properly paid and were not allowed to work more than 16 consecutive hours. His duties were described by his counsel (likewise counsel for petitioner in the case at bar) at pages 16-17 of his brief in the Court of Appeals as follows:

> "Certainly, Mr. Straub, whose supervisory work takes him into four states in which he is actually counting equipment in actual movement or making out time sheets for the men who are in actual movements and checking on their whereabouts, is acting in furtherance of or substantially affecting the interstate character of the operations."[54]

The question of whether the plaintiff was within the Federal Employers' Liability Act was not raised in *Thomas*

53. *Libbey* involved a railroad employee of the first category always included under the Act (moving equipment). *Edwards, Shelton, Robinson* and *Peresiptka* involved employees always encompassed under the third category—repair and maintenance men.

54 These duties would place *Straub* in the second category of employees along with the other yardmen even though a substantial part of his duties were performed in an office building. Mrs. Reed's duties never took her off the fifth floor of an office building.

*v. Union R. Co.*, 216 F. 2d 18 (6th Cir. 1954), and was not mentioned in the opinion. While petitioner apparently assumes that the plaintiff was a white-collar worker (Brief for Petitioner, page 14) all that appears in the opinion is that plaintiff, a railroad employee, fell while "leaving his office and stepping from the porch thereof onto the concrete floor of a roundhouse" and that there was evidence of a dangerous condition "near the foreman's office, in the roundhouse" (page 19). On that meager information it would appear that Thomas' roundhouse duties involved instrumentalities of transportation and that he was therefore within the coverage of the Act.

*The District Court Cases.*

Since 1939, seven district court cases have discussed the question of coverage. In the five cases where the employee was held to be within the Federal Act,[55] he would likewise have been covered prior to the Amendment providing there was no difficulty under the "moment of injury" rule. In one case a new trial was ordered because the record was not complete as to the nature of the plaintiff's duties.[56]

In the seventh case, *Holl v. Southern Pac. R. Co.*, 71 F. Supp. 21 (N. D. Cal. 1947), the employee was an assistant distribution clerk in the freight claim department, whose sole duty was to write on a form the route over which

55. *Erwin v. Pennsylvania R. R.*, 36 F. Supp. 936 (E. D. N. Y. 1941) (brakeman working as a member of a shifting crew); *Agostino v. Pennsylvania R. R.*, 50 F. Supp. 726 (E. D. N. Y. 1943) (trackman spreading ballast); *Patzaw v. Kansas City Southern Ry.*, 56 F. Supp. 897 (W. D. La. 1944) (section crew member employed in repair of tracks); *Zimmerman v. Scandrett*, 57 F. Supp. 799 (E. D. Wis. 1944) (member of a crew performing maintenance and repair work in a roundhouse); and *Brainard v. Atchison, Topeka & Santa Fe Ry.*, 87 F. Supp. 921 (Kan. 1950) (machinist's helper working on the assembly of switches).

56. *Shoenfelt v. Pennsylvania R. R.*, 69 F. Supp. 728 (S. D. N. Y. 1947) (powerhouse employee in a car repair shop).

freight, on which a claim for loss or damage was being made, had traveled. It was held that plaintiff's duties did not bring her under the Federal Act. The Court said at pages 23-24:

> "If she comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. And so, for that matter, does every other clerical employee in the department. I do not think that it was the intention of the Congress to include such employees and to withdraw them from the protection of State Employers' Liability Laws. On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce'*. This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, whether their work be clerical or not, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier*. This it could have done constitutionally even if it had included employees and activities clearly local and intrastate." (Citing cases.)
>
> "But the Congress did not do so. And I do not find in the cases which have arisen under the amendment any judicial sanction for doing it by interpretation." (Emphasis by the Court.)

*The State Cases.*

The numerous decisions of the various state courts involving the applicability of the state and federal act to injured railroad employees are also consistent with the decision of the Third Circuit in the case at bar. Where the Court has ruled that the employee was within the coverage of the FELA, the duties of the injured man have almost

invariably brought him within one of the three general categories of employees who recovered under the Federal Act prior to 1939, i.e., the trainmen, yardmen and repairmen. A brief reference may be made to the type of railroad men who were involved, since, among them, clerical workers, or anyone else who could be equated to Mrs. Reed, are conspicuous by their absence.

Falling into the first category are those such as firemen,[57] brakemen,[58] and conductors,[59] operating personnel who were, of course, always covered by the Federal Act.

Non-operating personnel falling within the second category such as switchmen,[60] guards on the right-of-way,[61] signalmen,[62] oilers[63] and yardmen,[64] have been held to be covered by the Act since 1939, as they were before.

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57. *Murphy v. Boston & Maine R. R.*, 319 Mass. 413, 65 N. E. 2d 923 (1946); *Louisville & N. R. R. v. Potts*, 178 Tenn. 425, 158 S. W. 2d 729 (1942); *Louisville & N. R. R. v. Stephens*, 298 Ky. 328, 182 S. W. 2d 447 (1944).

58. *Taylor v. Lumaghi*, 352 Mo. 1212, 181 S. W. 2d 536 (1944); *Ford v. Louisville & N. R. R.*, 355 Mo. 362, 196 S. W. 2d 163 (1946); *Pritt v. W. Virginia Northern R. R.*, 132 W. Va. 184, 51 S. E. 2d 105 (1948); *Beam v. Baltimore & O. R. R.*, 77 Oh. St. 419, 68 N. E. 2d 159 (1945); *Lewis v. I. A. C.*, 19 Cal. 2d 284, 120 P. 2d 886 (1942).

59. *Griffith v. Gardner*, 358 Miss. 859, 217 S. W. 2d 519 (1949); *Ernhart v. Elgin*, 337 Ill. App. 56, 84 N. E. 2d 868 (1949), aff., 405 Ill. 577, 92 N. E. 2d 96 (1950); *Pauly v. McCarthy*, 109 Utah 398, 166 P. 2d 501 (1946), rev., 330 U. S. 802 (1946).

60. *Rodgers v. N. York C. & St. Louis R. R.*, 328 Ill. App. 123, 65 N. E. 2d 243 (1946); *McCall v. Pitcairn*, 232 Iowa 867, 6 N. W. 2d 415 (1942); *Southern Pac. v. I. A. C.*, 19 Cal. 2d 281, 120 P. 2d 887 (1942).

61. *Baltimore & O. R. R. v. Rodheaver*, 197 Md. 632, 81 A. 2d 63 (1951); *Albright v. P. R. R.*, 183 Md. 421, 37 A. 2d 870 (1944), cert. den., 323 U. S. 735 (1944).

62. *Scarborough v. Pennsylvania R. R.*, 154 Pa. Super. 129, 35 A. 2d 603 (1944).

63. *McFadden v. Pennsylvania R. R.*, 130 N. J. L. 601, 34 A. 2d 221 (1943).

64. *McGuigan v. Southern Pac.*, 112 Cal. App. 2d 704, 247 P. 2d 415 (1952).

And non-operating personnel maintaining and repairing the instrumentalities such as the right-of-way workers,[65] and those repairing cars, locomotives and other equipment[66] have likewise been held to be covered by the Act.

As in any area of the law where lines must be drawn on the basis of degree there are, of course, border-line cases. Petitioner cites four such decisions in the "Brief for Petitioner".

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65. *Prader v. Pennsylvania R. R.*, 113 Ind. App. 518, 49 N. E. 2d 387 (1943); *Skanks v. Union Pac. R. R.*, 155 Kan. 584, 127 P. 2d 431 (1942); *Atlantic Coast Line v. Meeks*, 30 Tenn. App. 530, 208 S. W. 2d 355 (1947); *Rainwater v. Chi., R. I. & P. Ry.*, 207 La. 681, 21 So. 2d 872 (1945); *Missouri Pacific R. R. v. Fisher*, 206 Ark. 705, 139 S. W. 2d 552 (1940); *Piggue v. Baldwin*, 154 Kan. 708, 121 P. 2d 183 (1942); *Illinois Central R. R. v. Industrial Comm.*, 414 Ill. 546, 111 N. E. 2d 590 (1953); *Riley v. West Virginia Northern R. R.*, 132 W. Va. 208, 51 S. E. 2d 119 (1948); *Walden v. Chi. & N. W. Ry.*, 411 Ill. 378, 104 N. E. 2d 240 (1952); *Southern Pac. R. R. v. Romine*, 75 Ariz. 98, 251 P. 2d 908 (1953); *Copley v. I. A. C.*, 19 Cal. 2d 287, 120 P. 2d 879 (1942), cert. den., 316 U. S. 678 (1942); *St. Louis-San Francisco Ry. v. Wacaster*, 210 Ark. 1080, 199 S. W. 2d 948 (1947).

66. *Wills v. Terminal R. Ass'n of St. Louis*, 239 Mo. App. 1144, 205 S. W. 2d 942 (1947); *Deckert v. Chi. & Eastern R. R.*, 4 Ill. App. 2d 483, 124 N. E. 2d 372 (1955); *Harris v. Missouri Pacific R. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Williams v. Chi. R. I. & P. Ry.*, 155 Kan. 813, 130 P. 2d 596 (1942); *Maxie v. Gulf M. & O. R. R.*, 356 Mo. 633, 202 S. W. 2d 904 (1949). 358 Mo. 1100, 219 S. W. 2d 322; *Armstrong v. M. K. T. R. R. of Texas*, 233 S. W. 2d 942 (Texas Civ. App. 1950), cert. den., 342 U. S. 837 (1951); *Wheeler v. M. K. T. R. R.*, 205 S. W. 2d 906 (Mo. 1947); *Southern Pac. R. R. v. Industrial Acc. Comm.*, 88 Cal. App. 569, 199 P. 2d 364 (1948); *Baird v. N. Y. Cent. R. R.*, 299 N. Y. 213, 86 N. E. 2d 567 (1949); *Wright v. N. Y. Cent. R. R.*, 33 N. Y. S. 2d 531 (1942); *Great Northern Ry. v. Industrial Comm.*, 245 Wis. 375, 14 N. W. 2d 152 (1944); *Jordan v. Baltimore & Ohio R. R.*, 135 W. Va. 183, 62 S. E. 2d 806 (1950); *Bailey v. Central Vermont Ry.*, 113 Vt. 433, 35 A. 2d 365 (1944); *Trucco v. Erie R. R.*, 353 Pa. 320, 45 A. 2d 20 (1946), cert. den., 328 U. S. 843 (1946); *Southern Pac. R. R. v. I. A. C.*, 19 Cal. 2d 283, 120 P. 2d 888 (1942); *Downs v. Baltimore & Ohio R. R.*, 345 Ill. App. 118, 102 N. E. 2d 537 (1952).

It is not necessary to analyze the factual situations in these cases or to argue whether they were correctly or incorrectly decided. It should be noted, first, that while they have frequently been referred to as "border-line" cases, that adjective when used in that connection does not bear the same meaning as when used by the proponents of the 1939 Amendment. At that time the "border-line" cases involved men who worked on interstate and intrastate instrumentalities and were denied recovery if on intrastate work at the time of their injuries.

In the second place, the over-all duties of the claimants in those cases brought them to the stations, yards, tracks or equipment of the railroad during the course of their duties, and hence they shared, at least to some degree, the special hazards of the railroad industry. Thus in *Bowers*,[67] the plaintiff was a messenger who carried waybills, which formed an indispensable part of every freight shipment, to the freight agent in the immediate vicinity of the freight. In *Ericksen*,[68] a lumber inspector was injured while inspecting ties that were being loaded into a freight car standing alongside a dock. *Harris*[69] involved a shop employee who among other things serviced the fires in locomotives. In *Jordan*[70] plaintiff was a carpenter whose duties included the repair of bridges and other instrumentalities. All of these cases have little bearing on the rights of an employee whose activities never touched any form of transportation whatever.

There are likewise "border-line" cases which have held that the injured employee's remedy was under state

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67. *Bowers v. Wabash R. R.*, 246 S. W. 2d 535 (Mo. App. 1952).

68. *Ericksen v. Southern Pacific R. R.*, 39 Cal. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952).

69. *Harris v. Missouri Pac. R. R.*, 158 Kan. 679, 149 P. 2d 342 (1944).

70. *Jordan v. Baltimore and Ohio R. R.*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

rather than federal law. *Thompson v. Industrial Commission*, 380 Ill. 386, 44 N. E. 2d 19 (1942), cert. denied, 318 U. S. 755 (1943) (a watchman employed to protect the railroad premises against trespassing and thievery); *Lawrence v. Rutland Railroad Co.*, 112 Vt. 523, 28 A. 2d 488 (1942), cert. denied, 317 U. S. 693 (1943) (a railroad employee who was injured while cutting weeds along the side of the roadbed); *Boyleston v. Southern Ry. Co.*, 211 S. C. 232, 44 S. E. 2d 537 (1947) (a laborer at a freight station); *Moser v. Union Pacific R. Co.*, 65 Idaho 479, 147 P. 2d 336 (1944) (a laborer in construction of new track).

*The Supreme Court Cases.*

While a number of cases in this Court have arisen under the 1939 Amendment, none has specifically involved the subject of its coverage. It is, of course, true that the approach to the interpretation of the Act has changed greatly in the last seventeen years and that, under recent decisions, the legislation has been interpreted in a spirit of liberality toward the injured employee.[71] It is one thing to interpret the Act in a generous and humane manner for the benefit of those who face the hazards of the railroad industry, and quite another to expand it to include employees who were never intended by Congress to be taken away from the coverage of state legislation.[72]

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71. See, for example, *Lavender v. Kurn*, 327 U. S. 645 (1946).

72. Petitioner has made no effort to document its assertion (Brief for the Petitioner, p. 6) that the decision of the Court below will "distort the application of the Amendment by excising from its coverage great numbers of carrier employees such as petitioner who until now have properly been held to be comprehended by the statute". To the contrary, such employees have always been regarded as within the compensation acts of the states and this appeal constitutes an effort on the part of petitioner to "excise" them from the coverage of state law. The only reported case dealing with an attempt to bring clerical employees within the FELA is *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (N. D. Cal. 1947) and that attempt was entirely unsuccessful.

There are two decisions in this Court which clearly demonstrate that the FELA does not cover all railroad employees. *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, 190 (1952) involved an effort to broaden the coverage of the Jones Act on the theory that the 1939 Amendment to the FELA extended the scope of the Jones Act to employees not "seamen". In rejecting that construction, the Court stated that the 1939 Amendment "merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include *certain* persons not theretofore covered because they were not directly engaged in interstate or foreign commerce". (Emphasis supplied.)

Shortly thereafter, in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334 (1953), there was a direct ruling that the 1939 Amendment did not have the effect of making the FELA the exclusive remedy of all railroad employees. O'Rourke was a brakeman who was injured while working on a car float in navigable waters. The Court held that he could not recover under the FELA and that his sole remedy rested under the Longshoremen's and Harbor Workers' Compensation Act.[73]

Petitioner has cited three decisions of this Court in setting forth her position. *Lillie v. Thompson*, 332 U. S. 459 (1947) does not support a contention that there is FELA coverage for clerical workers. In the first place, an examination of the record in the case indicates that the defendant did not controvert in its answer the plaintiff's assertion of interstate commerce and the Court specifically noted that it was not passing on the issue of coverage. Secondly, the claimant's duties were "to receive and deliver messages to men operating trains in the yards" (page 461). She was not in any sense a clerical worker but a yard clerk and her duties carried her into direct contact with trains and tracks. Mrs. Reed, in the case at bar, worked in an

73. Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901; June 24, 1948, c. 623, §§ 1-5, 62 Stat. 602, 33 U. S. C. § 906.

office building and her duties had no relationship whatever to interstate transportation.

Petitioner also relies upon the decision of this Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125 (1943), where employees who operated and maintained an interstate toll bridge were held to be covered by the Fair Labor Standards Act.

While this Court has on occasion cited FELA decisions in opinions dealing with the FLSA, it has repeatedly noted that the coverage of the two acts is not co-extensive and that cases under one do not necessarily constitute precedents under the other. The FLSA applies to employees engaged in interstate commerce and those engaged in the production of goods for commerce. The latter provision gives the FLSA a very broad sweep in regard to local activities and provides the basis for a real difference in the coverage of the two acts. In earlier cases the Court appeared to give the term "engaged in commerce" in the FLSA a narrower interpretation than the corresponding provision of the FELA.[74] Recent decisions of this Court appear to depart from that view, but, because of the "production of goods for commerce" clause of the FLSA, there was never doubt that the overall coverage of the FLSA was much broader than that of the FELA.

Petitioner refers to the *Overstreet* case, without pointing out that it arose under the FLSA, and suggests that it poses a "simple, direct and workable test":

> "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?"[75]

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74. Thus, a cook on a camp car used for feeding and housing workers engaged in commerce was held within the FELA long before the Amendment, *Phila., B. & W. R. Co. v. Smith*, 250 U. S. 101 (1919); whereas in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), the court refused to hold that an employee with similar duties was within the FLSA.

75. Brief for the Petitioner, p. 23.

But *Overstreet* involved an employee who controlled a drawbridge which was an artery of interstate commerce and which was over navigable waters that were likewise such an artery. The Court applied the rule of *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146 (1913) which involved a railroad worker who was injured while carrying bolts to repair a railroad bridge and in referring to that case said at page 129:

> "It was pointed out that tracks and bridges were indispensable to interstate commerce and 'that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it.'"

Obviously, the duties of such bridgeman would directly affect interstate commerce, and the failure to perform them would "impede" commerce and, in fact, bring it to a standstill. If a railroad worker, he would have been covered by the FELA, as well as the FLSA, both before and after 1939.

The only other Supreme Court decision cited by petitioner in support of her position is *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350 (1943). It is included among a list of 21 cases supposedly involving "back shop" workers although that case did not present the question of the scope of the Act and involved a trackman whose coverage was not in dispute. Petitioner, however, suggests that the "back shop" cases are an illustration of the "great broadening of the FELA" accomplished by the Amendment and can only be explained by the "expanded ambit of the statute".[76]

In *Virginian Ry. Co. v. Federation*, 300 U. S. 515, 556 (1937), the Court had already stated that the activities of back shop employees have such a close relation to the interstate activities of a railroad that they are to be regarded

76. Brief for the Petitioner, pp. 14-15.

as a part of them, at least for the purposes of the Railway Labor Act.[77] Prior to 1939, however, a back shop employee injured while engaged in repairing an instrumentality of transportation, removed from service, was not covered by the FELA because at the moment of his injury the equipment on which he was working was not in transportation. A back shop employee engaged in new construction was not engaged in transportation work at all and for that reason was not covered. The 1939 Amendment eliminated the moment of injury test so that the former group, those repairing transportation equipment temporarily at rest, are now covered. The latter group, those engaged in new construction, are unaffected by the Amendment since it was not the moment of injury rule which had excluded them from coverage prior to 1939 and there was no indication in the Amendment that Congress intended to bring them within the Act.

It is this latter question which is raised in the *Southern Pacific* cases now pending before this Court. Respondent respectfully submits that those cases were wrongly decided by the Supreme Court of California. The employees there involved were not working on dead engines but on the construction of new cars (*Gilco*, *Eufrazia* and *Eelk*), wheels for stockpiling (*Aranda*) and the installation of retarders in the construction of a new yard (*Moreno*). No part of the duties of these workmen was in furtherance of interstate transportation nor did any part directly or closely and substantially affect such transportation. Any effect which they had upon it was no different from that which would have resulted from the efforts of some outside manufacturer or contractor who might have performed the construction, and could only be regarded as remote.

The decision in *Mitchell v. C. W. Vollmer & Co., Inc.*, 349 U. S. 427 (1955), involving the FLSA, should not be

77. The "back shop" employees in the *Virginian* case were engaged in the repair of locomotives, and there was no evidence, in the opinion at least, that any of them were engaged in new construction.

considered as an intermediate step in a complete departure from the rule of the *White* [78] and *Raymond* [79] cases wherein it was held that employees engaged in "new construction" are not covered by the FELA. It is sufficient to point out that this Court clearly recognized the difference in coverage between the FLSA and the FELA in the opinion in the *Vollmer* case where the FELA was characterized as a "different act of another vintage" (p. 429).

To summarize the effect of the litigated cases since 1939: all of them are consistent with respondent's basic premise that only three general groups of employees fall within the coverage of the Act. They consist of the men who operate the carrier's equipment, those who directly affect the movement of the equipment and those who maintain or repair the instrumentalities of transportation. On the other hand, all employees whose duties are exclusively concerned with local and intrastate activities are no more to be found within the cases permitting recovery under the Act after the Amendment, than they were found within the ones decided prior to 1939.

There is no question that the decisions of this Court in the last seventeen years reflect the much wider coverage that the Act has had since the Amendment. The abolition of assumption of risk and the "moment of injury" rule broadened the scope of the Act materially, and the Court's decisions with regard to the submission of questions of negligence to the jury have likewise enabled many employees to recover who would not have done so in the earlier years. However, there is nothing in any of the decisions which would warrant the inclusion of clerical workers within the coverage of the Act. The wording of the Amendment, its background and subsequent interpretation, all militate against an extension of the meaning of the Act which would permit petitioner to recover in this proceeding.

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78. *New York C. Ry. v. White*, 243 U. S. 188 (1917).

79. *Raymond v. Chicago, M. & St. P. Ry.*, 243 U. S. 43 (1917).

## CONCLUSION.

The coverage of the FELA both before and after the 1939 Amendment has been extended to employees engaged in interstate transportation and to no others. Before the Amendment it was necessary to be engaged therein at the very moment of injury and the Amendment abolished that requirement. It did not go further and include employees whose activities had no close and substantial relationship to interstate transportation.

Once it is clear that the Act was not intended to embrace all railroad employees within the scope of its coverage, the fate of petitioner's FELA claim is no longer open to doubt. Her duties were purely clerical; she never had contact, physical or otherwise with any instrumentality of transportation; she faced only the hazards of file cabinets and other office furniture and the floors and windows of an office building. She typifies the employee whose activities are local and intrastate in character, for whom state compensation acts are expressly designed and who, because negligence need not be proved in order to permit recovery, is much better off with the remedies provided by local law.

The lower court had no jurisdiction of the subject matter of this litigation, and the case was properly dismissed. The judgment should be affirmed.

Respectfully submitted,

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